

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0393, Jane Kell, Beneficiary of the Estate of George M. Hyde v. George F. Hyde, the court on September 8, 2005, issued the following order:

The motion to supplement appellant's citations is granted.

The respondent, George F. Hyde, appeals an order of the probate court imposing a constructive trust in the amount of \$361,987.90 and ordering him to disgorge that amount to the estate of George M. Hyde. We affirm.

The respondent argues that the petitioner failed to provide sufficient notice of her claim because she did not specify every transaction that she sought to challenge. A review of the record, however, indicates that, in response to this argument in the probate court, the petitioner filed specifications exceeding ten pages in which she not only detailed the facts supporting her claims but also included a lengthy list of checks in support of her assertion that the daily living expenditures claimed by the respondent were excessive. See Cambridge Mut. Fire Ins. Co. v. Crete, 150 N.H. 673, 678 (2004) (discussing New Hampshire's liberal doctrine of amendment); RSA 514:8 (1997) (trial courts may liberally allow parties to amend pleadings to cure technical defects). Contrary to the respondent's assertion, we do not construe the trial court's order as recognizing a cause of action based upon excessive living expenditures; rather, the trial court found that the expenditures claimed by the respondent to be living expenses were excessive.

The respondent also contends that there was insufficient evidence to establish that the decedent was incompetent in 2000. Whether the decedent was incompetent is a question of fact; we will sustain the probate court's finding unless it is "so plainly erroneous that [it] could not be reasonably made." RSA 567-A:4 (1997). The evidence included testimony that the respondent's wife had reported that the decedent was experiencing confusion in 1997, that the decedent's granddaughter found him confused in 1997, that the decedent's physician noted his confusion in 1999 while he resided in a nursing home and recommended a psychological evaluation, and that an emergency room physician described him as severely demented in 1999 and unable "to give any history." Accordingly, we find no error.

The respondent also contends that the probate court erred in imposing a constructive trust. A constructive trust may be imposed when clear and convincing evidence shows that a confidential relationship existed between two people, that one transferred property to the other, and that the person receiving the property would be unjustly enriched by retaining the property, regardless of

whether the person obtained the property honestly. In re Estate of Cass, 143 N.H. 57, 60 (1998). A confidential relationship exists if there is evidence of a family relationship in which one person justifiably believes that the other will act in his interest. Id. A person may be unjustifiably enriched if he obtains property by fraud, duress, or undue influence, or violates a duty that arises out of a fiduciary relation to another. Id. Whether undue influence exists is a question of fact. Id. at 61.

The respondent is the son of the decedent. In 1996, he and his wife moved into the decedent's residence; the decedent's 1996 tax return indicates that he was blind. The record also contains evidence that the decedent's previous living arrangement had failed due to his blindness and confusion. The decedent had a practice of drawing a check once a week for one hundred dollars. Shortly after the respondent and his wife moved in, the checks increased to \$400, \$500 or \$600 and were sometimes drawn more frequently than weekly. The record contains evidence of several other transfers of funds that the respondent contends were gifts. For example, in 2000, the respondent, using a power of attorney, endorsed over to himself a check for \$175,000 that had been made payable to the decedent and purchased a Florida condominium in the respondent's name. Based upon the record before us, we find no error in the trial court's imposition of a constructive trust. In calculating the amount to be subject to the trust, the probate court properly excluded amounts that either were expended on behalf of the decedent or did not benefit the respondent.

The respondent also argues that the trial court had reached a decision in the case before he presented his evidence. To the extent that this argument might be considered fully developed, it has not been preserved for our review and is therefore not properly before us. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (judicial review unavailable for issues not raised in forum of trial).

The respondent also contests the imposition of attorney's fees. Given the record before us, we find no error in the trial court's ruling. See RSA 506:7, V (1997).

To the extent that the respondent raises other arguments, they either require no further discussion in light of our foregoing analysis or lack merit.

Affirmed.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**